No. 22,708

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

STADIUM APARTMENTS, INC., ET AL.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This action was brought by the United States to foreclose a mortgage insured under Section 608 of the National Housing Act, 12 U.S.C. 1743 and assigned to the United States by the original mortgagee after the mortgagor had defaulted (R. 23).[1/] The district court entered a judgment and decree of foreclosure

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1/ "R." references are to Volume I of the Transcript of Record in this Court, containing pleadings, orders and other documents. "Tr." references are to the reporter's transcript of the hearing in the district court.

on November 3, 1967, which judgment imposed upon the United States as mortgagee, a period for redemption to run after the foreclosure sale pursuant to the state law of Idaho (R. 71). The United States purchased the property at the foreclosure sale, which was held on December 12, 1967, and confirmed on December 29, 1967 (R. 74). Notice of appeal was filed on December 29, 1967. This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

1. The federal mortgage insurance program.

The United States has since 1934 engaged in a vast nationwide program of insuring mortgages under the various titles of the National Housing Act, 12 U.S.C. 1701. The particular mortgage insurance with which we are here concerned was issued under Title VI of the Act, 12 U.S.C. 1736-1746(a), which was designed "to assist in relieving the acute shortage of housing accommodations available to veterans of World War II at prices within their reasonable ability to pay * * * ." 12 U.S.C. 1738(a). Under this title of the Act, and the regulations promulgated pursuant to the authority conferred by Section 607 (12 U.S.C. 1742), [2/] the Federal Housing Administration is authorized to insure mortgages which meet all of the statutory and regulatory prerequisites.

2/ The 1947 Supplement to the Code of Federal Regulations contains the regulations for Title VI in force at the time the mortgage in the instant case was executed and insured, November 30, 1949 (R. 15). Since they thus govern the mortgage insurance transaction in this case, these regulations will be cited throughout.

The mortgage insurance in the instant case was obtained pursuant to Section 608 of the Act, 12 U.S.C. 1743, which authorized such insurance primarily on large, multi-family dwellings. 3/ The detailed procedure for obtaining such insurance is spelled out by the statute and the regulations: First, the mortgagee (who must receive prior, formal approval by the FHA) must apply for mortgage insurance on the standard forms prescribed by the FHA, giving information required by the FHA respecting the project. 4/ Upon approval of this application, the FHA issues a commitment of insurance, setting out the terms and conditions under which the mortgage will be insured. 5/ If the transaction then meets all the eligibility tests established by the FHA with respect to the mortgagor, with respect to the mortgaged property, and with respect to the mortgagor's title therein, and if the mortgage agreement is executed on an FHA form containing all of the required terms and conditions, the mortgage is accepted for insurance. 6/

3/ Specifically, Section 603(b), 12 U.S.C. 1738(b), authorizes mortgage insurance for residential dwellings to be occupied by up to four families. Section 608 confers similar authority for mortgages "[i]n addition to [those] insured under section [603]." Section 608(a), 12 U.S.C. 1743(a).

4/ 24 C.F.R. §§ 580.1-580.7 (1947 Supp.).

5/ 24 C.F.R. § 580.8 (1947 Supp.).

6/ 12 U.S.C. 1743(b); 24 C.F.R. §§ 580.10-580.37 (1947 Supp.).

In the event of a default by the mortgagor, the mortgagee may receive the benefits of the insuring agreement either by assigning the mortgage to the FHA or by obtaining title to the property (by foreclosure or otherwise) and conveying it to the FHA. 7/ If the mortgagee elects to assign the mortgage, the Federal Housing Commissioner is authorized to "institute proceeding for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion." 8/ In addition, in order to protect the Housing Fund, the Commissioner is authorized to become the purchaser of the property at a foreclosure sale. 9/

2. The facts of this case.

On November 30, 1949, Stadium Apartments, Inc., borrowed $130,000 from the Prudential Insurance Company for the purpose of building an apartment house in Caldwell, Idaho. The note and mortgage were executed on FHA forms (R. 8-16).

The mortgage form contained the following language: "The Mortgagor, to the extent permitted by law, hereby waives the benefit of any and all homestead and exemption laws and of any right to a stay or redemption and the benefit of any moratorium law or laws." (R. 4).

7/ 12 U.S.C. 1743(c).

8/ 12 U.S.C. 1713(k), incorporated by reference into Title VI by 12 U.S.C. 1743(f).

9/ Ibid.

The FHA, on December 7, 1950, endorsed the loan for insurance pursuant to Section 608 of the National Housing Act, 12 U.S.C. 1743, in the manner outlined above (R. 10).

In 1958, the note and mortgage were modified in details not presently relevant. The modification was approved by the Federal Housing Commissioner (R. 17-21).

Stadium Apartments defaulted on the note by failing to pay the installments due on and after December 1, 1966 (R. 68). Because of this default, and exercising its rights under Section 608(c) of the Act, 12 U.S.C. 1743(c), Prudential assigned the note and mortgage to the Secretary of Housing and Urban Development. 10/

The United States filed the complaint in the present action on August 14, 1967, seeking (1) a judgment for $88,492.30 principal due and owing, plus accrued interest and sums advanced for taxes and costs; (2) a judgment of foreclosure and sale of the property; (3) a deficiency judgment for the amount of the debt unsatisfied by the foreclosure sale price; and (4) the appointment of a receiver (R. 3-7). The district court appointed a receiver on September 1, 1967 (R. 33-36). An amended complaint was filed on September 5, 1967 (R. 37-41).

10/ By P. L. 90-19, § 1(a)(3), 81 Stat. 17, the Secretary succeeded to the duties of the Federal Housing Commissioner under the Act.

Because none of the defendants appeared either in person or by counsel, on September 26, 1967, the United States requested, and the clerk of the district court entered, default against the defendants Stadium Apartments, Inc., St. Luke's Hospital and Nurses Training School, Ltd., China B. Fordice, and Paul Ernst, d/b/a Ernst Fuel Company (R. 65).

On October 12, 1967, the district court held a hearing at which he ordered that the United States generally have the relief requested, including judgment for a total of $93,804.97. During the October 12th hearing, the United States requested the court to frame the foreclosure decree so that there would be no period following sale during which the mortgagor could redeem. The district court judge rejected this request, in the following terms (Tr. 23-24):

> THE COURT: Mr. Suiter, I seriously doubt that Prudential could foreclose a man from a redemption period under the laws of the State of Idaho. I don't see how the government is in any better position than Prudential would be. I doubt if the laws of the State of Idaho would permit Prudential to foreclose this mortgage and foreclose a man from redemption. This happens to be a corporation, but it is made with the idea it could be an individual. I don't see how the government is in any better position than Prudential. You are foreclosing so far as this Court is concerned under the laws of the State of Idaho. If you can show me any law that this is permitted, I would permit this in the decree. Otherwise, I will not. I think that you are bound by the law of the State of Idaho, as we often have discussed, and I don't intend to change it. I don't think the law of the State of Idaho so provides or permits it.

MR. SUITER: Well, on behalf of the government I would respectfully urge that State law does not apply in this proceedings.

THE COURT: We have had that argument before, but I can't agree with you and I am sorry I don't agree. So the decree will have to provide for a period of redemption. I don't agree with you, as you well know. Now I am going to deny your request.

On November 3, 1967, the district court filed Findings of Fact and Conclusions of Law (R. 66-69), and a Judgment and Decree of Foreclosure (R. 70-73). The decree generally gave the relief requested by the United States. However, it also provided that, after the foreclosure sale, the Marshal would execute a deed to the purchaser only "after the time allowed by law for redemption has expired" (R. 71). 11/ The decree also stated that the defendants and all other persons claiming any interest in the mortgaged land would be foreclosed from the equity of redemption only "from and after the delivery of said Marshal's deed" (R. 72, par. 4).

On December 12, 1967, the Marshal's sale was held. The only bidder was the United States, which purchased the property for $55,100.00 (R. 82).

11/ Because there is no relevant post-sale-redemption period under federal law (Madison Properties, Inc. v. United States, 375 F. 2d 740, 741 (C.A. 9)), the reference in the decree to "the time allowed by law for redemption" was obviously to the state law of Idaho, which provides for a one-year redemption period. This is made clear by the district court's statement at the hearing (Tr. 23-24), which we have quoted above.

2 Idaho Code 11-402, which provides for post-foreclosure-sale redemption, was amended in 1967 to limit redemption periods to six months for tracts of less than 20 acres. However, the amendment specifically does not apply to mortgages made before its effective date. Idaho S.L. 1967, ch. 293, § 3.

ARGUMENT

As we demonstrate below, the reference in the decree to Idaho law as controlling is erroneous; the law governing this federal mortgage is federal rather than state law. We argue next that while under some circumstances a court applying federal law to the interpretation of a federal contract may use or adopt state law, it may only do so where no federal policy would be impaired, and its use in the present case has impaired the federal policies of uniform administration of the nationwide mortgage insurance program, protection of the federal treasury, and promotion of the security of federal investments.

I

THE PARAMOUNT FEDERAL INTEREST IN THE INTEGRITY OF THE NATIONWIDE MORTGAGE INSURANCE PROGRAM COMPELS INITIAL REFERENCE TO FEDERAL LAW.

It is by now well settled that Congress has by the Rules of Decision Act, 28 U.S.C. 1652, provided for the application of federal law to questions of federal rights and liabilities arising from large-scale federal programs and transactions. 12/ The Supreme Court has held that one of the main purposes of that Act "was to avoid the introduction of disparities, confusions and

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12/ 28 U.S.C. 1652 provides as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. [Emphasis supplied.]

conflicts which would follow if the Government's general authority were subject to local controls" through application of state law. United States v. Allegheny County, 322 U.S. 174, 183.

In a long line of decisions, [13/] the Supreme Court has made it clear that the paramount federal interest in matters arising out of nationwide government programs and vast federal transactions compels the application of federal law. In United States v. Shimer, 367 U.S. 374, the Court reaffirmed this position in holding that federal rather than state law must be applied to settle the obligations of the Veterans' Administration after default under mortgages which it had guaranteed. Similarly, federal rather than state law has been applied to ascertain the liability of the maker of accommodation paper to a federal corporation insuring the holder's deposits (D'Oench Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447); to decide the extent of the obligation of the guarantor of a forged endorsement on a check drawn by the United States (Clearfield Trust Co. v. United States, 318 U.S. 363); to determine whether particular machinery was the property of the United States or its private contractor for purposes of imposing state property taxes (United States v. Allegheny County, 322 U.S. 174); to the interpretation of a lease to which an agency

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13/ E.g., Clearfield Trust Co. v. United States, 318 U.S. 363, 366; United States v. Allegheny County, 322 U.S. 174, 181-183; United States v. Standard Oil Co., 332 U.S. 301, 306.

of the United States was a party (United States v. 93.970 Acres, 360 U.S. 328); and, most recently, to fix the ownership of United States savings bonds after the death of one of the co-owners (Free v. Bland, 369 U.S. 663).

This Court has consistently applied these principles in holding that federal rather than state law controls the Government's rights under mortgages pursuant to the National Housing Act or similar federal programs and assigned to the Government. Thus, in United States v. View Crest Garden Apartments, Inc., 268 F. 2d 380, 382 (C.A. 9), certiorari denied, 361 U.S. 884, this Court emphasized: " * * * we do find it to be clear that the source of the law governing the relations between the United States and the parties to the mortgage here involved is federal." See, in addition, Herlong-Sierra Homes, Inc. v. United States, 358 F. 2d 300 (C.A. 9), and United States v. Queen's Court Apartments, Inc., 296 F. 2d 534 (C.A. 9). Indeed, recently in Clark Investment Co. v. United States, 364 F. 2d 7, 9 (C.A. 9), another case involving an FHA mortgage, this Court stated: "It is too well settled to require extended discussion that federal law is * * * applicable."

This rule has been uniformly followed in every federal court of appeals that has considered the question. See, e.g., Penagariacano v. Allen Corp., 267 F. 2d 550, 558 (C.A. 1); United States v. Walker Park Realty Corp., 383 F. 2d 732 (C.A. 2); United States v. Flower Manor, Inc., 344 F. 2d 958 (C.A. 3); United States v. Woodland Terrace, Inc., 293 F. 2d 505 (C.A. 4); United States v.

Sylacauga Properties, Inc., 323 F. 2d 487, 491 (C.A. 5); United States v. Helz, 314 F. 2d 301 (C.A. 6); United States v. Chester Park Apartments, Inc., 332 F. 2d 1, 4 (C.A. 8); Director of Revenue, State of Colorado v. United States, _____ F. 2d ____ (C.A. 10, No. 9640, decided April 1, 1968).

There is no merit to the suggestion of the district court that state law controls because the United States, as assignee of Prudential, assertedly gained only the rights that Prudential would have had under state law (Tr. 24-25). Federal law governs the present case because the loan was made under a nationwide federal mortgage guarantee program. Despite the fact that the actual loan funds were provided by Prudential, the Government has been involved with this loan from its very beginning. As pointed out above (p. 3), the loan was obtained only after Stadium Apartments, Inc., had met FHA approval as a mortgagor, had applied for and received a commitment of insurance from FHA for the specific loan, and had met various eligibility tests defined by the FHA. The mortgage and note themselves were executed on FHA forms. And of course the FHA had all along been obligated to purchase the note and mortgage from Prudential upon default of the mortgagor. In short, the note and mortgage in the present case were federal contracts in which the United States participated from the outset, and in whose execution the United States was vitally interested. Regardless of whether or not Prudential's rights might have been governed by state law had the note and mortgage not been assigned to the United States, it is clear that the rights of the United States after assignment

are governed by federal law. Cf., Small Business Administration v. McClellan, 364 U.S. 446, 452. Indeed, in many cases decided by this Court and other courts of appeals involving mortgages pursuant to federal programs, the notes and mortgages had been assigned to the Government by private lendors, and it was held that federal law controlled. In none of the cases was there any suggestion that state law might control the rights of the United States because it was the assignee of a private lendor. E.g., Clark Investment Co. v. United States, supra; United States v. View Crest Garden Apartments, supra; United States v. Sylacauga Properties, Inc., supra. United States v. Walker Park Realty Co., supra.

Even assuming arguendo that state law governed the rights of the parties before the assignment of the note and mortgage to the United States (which assumption is highly dubious), the district court's apparent belief that the United States may not exercise its federal law rights and prerogatives when it is the assignee of a private party was erroneous. The Supreme Court specifically rejected such reasoning in United States v. Summerlin, 310 U.S. 414. There, the United States, on behalf of the Federal Housing Administrator, was the assignee of a claim against the estate of J. F. Andrew. The United States asserted the claim against the administratrix in a Florida state court proceeding. The Florida courts held that the claim was "void" as not having been brought within the time prescribed by a Florida statute. The Supreme Court reversed. It pointed out that the defenses of state statutes of limitations and

laches were not available against the United States. It then continued: "We are of the opinion that the fact that the claim was acquired by the United States through operations under the National Housing Act does not take the case out of this rule." 310 U.S. at 414. This rule has found frequent application in other areas. For example, with respect to the United States' federal law rights of having debts owed to it satisfied before those of other creditors, it is uniformly held that the Federal Government is entitled to such priority for debts due it even where the debts are the result of claims assigned to the United States by private persons who could not themselves invoke the priority rights under federal law. E.g., United States v. Anderson, 334 F. 2d 111 (C.A. 5); Korman v. Federal Housing Administrator, 113 F. 2d 743 (C.A. D.C.).

In sum, it is clear that the rights of the United States under the mortgage here involved are determined by federal law.

II

A UNIFORM FEDERAL RULE NOT ALLOWING FOR A POST-SALE PERIOD OF REDEMPTION IS REQUIRED IN CASES SUCH AS THIS.

Having established that federal rather than state law sets the terms of this foreclosure action, we turn to the question of whether it would be proper for federal law to adopt the Idaho State practice of allowing a period after the foreclosure sale during which the mortgagor or others interested in the property might redeem.

The determination that federal law governs an issue arising under a nationwide program usually requires the application of

a uniform rule rather than the adoption of principles of local law as the federal rule. For the adoption of local law tends to defeat the very purpose of the supremacy clause and the Rules of Decision Act--the avoidance of "disparities, confusions and conflicts" following from the application of varied state law rules. See United States v. Allegheny County, 322 U.S. 174, 183.

A principal consideration upon which turns the determination of whether a uniform rule or local law is ultimately to be applied as the federal law, is the need for uniformity of administration. Thus, in the Clearfield Trust decision, supra, the Supreme Court declared that except for the "occasional" instances in which there is no compelling need for uniformity, federal law must be applied to assure the uniform administration of the nationwide federal program or activity involved (318 U.S. at 367):

> In our choice of the applicable federal rule we have occasionally selected state law. See Royal Indemnity Co. v. United States, supra, [313 U.S. 289, 296-297]. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the

> vagaries of the laws of the several states. The desirability of a uniform rule is plain. * * * 14/

Whether the United States should be subject to the post-foreclosure-sale periods of redemption imposed by state law is plainly a question which should be answered uniformly, without reference to the variety of state laws. The courts have with unanimity recognized the nationwide character of federal mortgage insurance programs and the need for uniformity in resolving legal issues arising under them. See, e.g., the cases cited p. 10 , supra. Among the primary reasons for applying a uniform rule has been the great diversity among the states on the issues which have arisen involving mortgage transactions. Because of this diversity, if there were no uniform federal rule to govern the matter, the FHA, before insuring mortgages or making loans, would be forced to weigh not only the considerations made relevant by the National Housing Act, but also the countervailing considerations raised

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14/ By contrast, an example of a situation calling for application of state law is found in United States v. Yazell, 382 U.S. 341. There, the Supreme Court held that the Texas law of coverture, under which Mrs. Yazell had no capacity to bind her separate property, would apply to a Small Business Administration contract. The factors which the Supreme Court noted as governing its decision were: first, that the contract was "a custom-made, hand-tailored, specifically negotiated transaction. It was not a nationwide act of the Federal Government emanating in a single form from a single source" (382 U.S. at 348); second, the case involved the "peculiarly local" matter of family property rights and liabilities.

Neither of these factors is present here. Indeed, as this Court noted in Clark Investment, supra, 364 F. 2d at 9, the Supreme Court "expressly distinguishes" FHA mortgage cases, such as the present case, from its Yazell holding by pointing out that the FHA "issues separate [mortgage] forms for each State but does not negotiate with individual applicants." 382 U.S. at 348. The Sixth Circuit, in United States v. Carson,

(fn. continued on next page)

by "the vagaries of the laws of the several states." Clearfield Trust Co. v. United States, supra, 318 U.S. at 367. Thus, projects in some states would be financed by FHA-insured mortgages, while in other states the obtaining of mortgage insurance might be constricted or withheld because the United States would not have the prospect of obtaining the full measure of the pledged security. Such a result would be contrary to Congress's intent of creating a nationwide program "* * * to assist in relieving the acute shortage of housing which now exists and to increase the supply of housing accommodations available to veterans of World War II at prices within their reasonable ability to pay * * *." 12 U.S.C. 1738.

This Court has often held that state rules may not impinge upon the uniform federal rule where to do so would impair the federal policies involved. A most extensive discussion of the standards for determining the choice between federal and state law is found in this Court's opinion in United States v. View Crest Garden Apartments, 268 F. 2d 380 (C.A. 9). That case concerned the question of whether the state law of Washington or federal law should determine whether a receiver should be appointed after default of an FHA mortgage. After noting that the source of law governing the question was federal, the

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14/ (Continued):
372 F. 2d 429, 432-434 (C.A. 6) and the Tenth Circuit, in Director of Revenue, State of Colorado v. United States, F. 2d , (C.A. 10, No. 9640, decided April 1, 1968) have found the Yarell decision similarly limited.

opinion states:

> It is * * * equally clear that if the law of the State of Washington is to have any application in the foreclosure proceeding, it is not because it applies of its own force, but because either the Congress, the FHA, or the Federal Court adopts the local rule to further federal policy. [Emphasis added.]

268 F. 2d at 382. The Court then proceeded to analyze the federal policies which applied. It pointed out that compliance with state recording acts and use of the state definition of "mortgage", for instance, do not interfere with, and indeed aid federal policy by obviating the need for a separate federal system of recordation. But the Court then drew a sharp line distinguishing the application of state law in such matters from its application to limit the remedies of the United States upon breach:

> A different set of factors come into play when the planning stage and the working stage of the agreement have been terminated. After a default the sole situation presented is one of remedies. Commercial convenience in utilizing local forms and recording devices familiar to the community is no longer a significant factor. Now the federal policy to protect the Treasury and to promote the security of federal investment which in turn promotes the prime purpose of the Act -- to facilitate the building of homes by the use of federal credit -- becomes predominant. Local rules limiting the effectiveness of the remedies available to the United States for breach of a federal duty can not be adopted. [Emphasis added.]

Using this standard, this Court, and other courts of appeals, have refused to apply state law where such application would negate the effect of federal policies. See, e.g., Herlong-Sierra Homes, Inc. v. United States, supra; United States v. Flower Manor, Inc., supra;

United States v. Walker Park Realty Corp., supra (cases which hold that the right of the United States to a deficiency judgment is not limited by state statutes or practice); United States v. Queen's Court Apartments, Inc., supra; United States v. Sylacauga Properties, Inc., supra (cases holding that federal law governs the right of the United States to have a receiver appointed).

Particularly relevant to the present case is this Court's recent decision in Clark Investment Co. v. United States, supra. That case involved another FHA project in Idaho, but there, in contrast to the present case, the United States had consented to a post-foreclosure-sale period of redemption. 15/ The issue in Clark was whether the federal courts ought to apply that portion of 2 Idaho Code 11-407 (the same statute involved here) which provides that the redemptioner is entitled to have the rents which are collected from the time of sale to the time of redemption deducted from the redemption price. This Court again held that "the federal courts, in fashioning applicable federal rules, can use or adopt state rules where no federal policy would be impaired" (364 F. 2d at 9). Pointing out that the

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15/ P. 15-16 of the Brief of the Appellee (United States) on appeal in Clark Investment Co. v. United States, 364 U.S. 7 (C.A. 9, No. 19,999). See United States v. West Willow Apartments, Inc., 245 F. Supp. 755, 757-758 (E. D. Mich.), holding that the United States is not bound by state statutes imposing post-sale redemption but that the United States is free to consent to the use of this device.

Idaho rule on disposition of rents was one of many disparate state rules, the Court concluded that "the federal policy to protect the treasury and to promote the security of federal investment requires a uniform federal rule." Ibid.

The present case questions whether another portion of the same Idaho statute may be applied in federal mortgage foreclosure actions. We contend that considerations similar to those applied by this Court in such cases as Clark Investment preclude the application here of state law.

Because post-foreclosure-sale periods of redemption exist only where created by statute (Madison Properties, Inc. v. United States, 375 F. 2d 740, 741 (C.A. 9)), and as the majority of jurisdictions have no such statutes, the failure of Congress to provide for a redemption period is as forceful as expression of federal policy as a positive statement. 16/ Moreover, the state rules threatening the federal policy are diverse. Seventeen states have laws imposing post-foreclosure-sale periods of

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16/ Congress has specifically provided for a post-sale right of redemption lasting one year as a condition of jurisdiction over the United States in foreclosure actions in which the United States is a junior lienor. 28 U.S.C. 2410(c), which provision is made inapplicable to the National Housing Act by 12 U.S.C. 1701. See Madison Properties, Inc. v. United States, 375 F. 2d 740, 741 fn. 3 (C.A. 9).

Congress's express provision for a post-sale period of redemption in such narrow circumstances indicates a Congressional intent to limit the use of the post-sale redemption to those circumstances.

redemption varying in length from six months to eighteen months. One state postpones the foreclosure sale until a one-year period for redemption after judgment has expired. 18/ The majority of states have no such statutes.

It is also readily demonstrable that imposition of a post-foreclosure-sale period of redemption does significantly impair the effectiveness of the federal foreclosure remedy. The natural effect of the imposition of the post-sale period of redemption is to chill the bidding at the sale, because the purchaser at the sale may not obtain a clear title to the property, but obtains a title which can be defeated by a redemptioner who may redeem at any time until the period has expired. Therefore, the amounts bid at such sales, when there is bidding at all, are artifically low. In such circumstances, the United States is forced to bid for the property, because ultimate sale of the property for a fair price is almost always the only feasible way for the United States to collect a sizable proportion of the debt

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17/ Alaska Statutes 09.45.190, 09.35.250 (1 year); 4 Ariz. Rev. Stat. 12-1282 (6 months); 2 Ark. Stat. 1947 Ann. 30-440 (1 year); Cal. Code Civ. Proc. 725a (1 year); 77 Ill. Ann. Stat. 18c (1 year); 4 Kan. Stat. Ann. 60-2414 (6 to 18 months); Mich. Stat. Ann. 27A.3140 (6 months); 29 Vernon's Ann. Mo. Stat. 443.410 (1 year); 7 Rev. Code Mont. 98-5836(2) (1 year); 1 Nev. Rev. Stat. 21.200 (1 year); 5 N. Mex. Stat. Ann. 24-2-19, 24-2-19.1 (9 months); 6 N. Dak. Cent. Code. 32-19-18 (1 year); 1 Ore. Rev. Stat. 23.560 (1 year); Utah Rules Civ. Proc., Rule 6(f)(3) (6 months); 4 Vermont Stat. Ann. Title 12, App. III, Rule 39 (1 year Rev. Code Wash. Ann. 6.24.140 (8 months or 1 year).

18/ Wisconsin Stat. Ann. 278.10(2) (1 year before sale).

due it, [19] for as in the present case, the defaulting mortgagor is usually judgment-proof. But, having bought the property, the United States may not hope to sell it at a fair price until the period of redemption is over, for the same reason that the sale itself brings depressed bids: while the right of redemption remains outstanding the United States cannot deliver clear title to the property.

Nor may the United States, if it purchases the property at the sale, make substantial improvements on the property during the redemption period in order to render it more attractive for ultimate resale. The redemption price as formulated by the Idaho statute is the sum of the purchase price, assessments and taxes, the prior liens of the purchaser (excepting the judgment lien held by the mortgagee), and interest. The fair market value of improvements made by the purchaser is not included, and while there is no Idaho case on this point, it has elsewhere been held that a mortgagee who purchases at the foreclosure sale is not permitted to make improvements that will render it more difficult for the mortgagor to redeem. [20] See Wise v. Layman, 197 Ind. 393, 150 N.E. 368; Bowen v. Boughner, 189 Conn. 107, 224 S. W. 653.

19/ The Secretary is authorized to purchase at the sale "for the protection of the General Insurance Fund." 12 U.S.C. 1713(k), made applicable to loans under Title VI by 12 U.S.C. 1744(f).

20/ The identical rationale would seem to apply to a purchaser who was not the mortgagee. Such a purchaser could similarly not count on making improvements until the redemption period had expired, even though he would have to pay for normal maintenance. This provides another reason why the foreclosure sale would not bring the fair market price.

Thus, the net effect of the imposition of the post-sale-redemption period is to force the United States to buy the property and to maintain it in the status quo until the redemption period expires. This causes the FHA to freeze its funds in a dormant project which it cannot sell until the period is over. In addition, the FHA must pay for the expenses of its custodianship of the property, and must involve itself in the concomitant administrative tasks. These impediments render the foreclosure remedy more costly and more time-consuming. The district court's imposition of the post-foreclosure-sale period of redemption thus diverts the money and energies of the FHA from use "for the prime purpose of the Act -- to facilitate the building of homes by the use of federal credit * * * ." United States v. View Crest Garden Apartments, supra, 268 F. 2d at 383.

Therefore, owing to the diversity of state rules with regard to post-foreclosure-sale redemption, if the district court's ruling stands, the uniform nationwide administration of the National Housing Act may well be disrupted. 21/

21/ The mortgage form in the present case contains the following language: "The mortgagor, to the extent permitted by law, hereby waives the benefit of any and all homestead and exemption laws and of any right to a stay or redemption and the benefit of any moratorium law or laws" (R. 14). Therefore, even if this Court rules that the district judge was correct in applying Idaho law, we contend that the mortgagor has waived its rights under state law. While we have found no Idaho case on this point, waiver of the statutory post-foreclosure-sale period of redemption appears to be generally permitted. E.g., King v. King, 215 Ill. 100, 74 N.E. 89; Cook v. McFarland, 78 Iowa 528, 43 N.W. 519; Nipel v. Hammond, 4 Colo. 211. Contra: Beverly v. Davis, 79 Wash. 537, 140 P. 696.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, insofar as it imposes a post-foreclosure-sale period of redemption, the judgment of the district court be reversed.

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MAY 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Subscribed and Sworn to before me this 14th day of May, 1968.

Notary Public

My Commission expires August 31, 1971.